STATE OF NORTH CAROLINA COUNTY OF WAKE	GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION No. 24-CVS-003534-910
BEVERLY BARD, *et al.*, Plaintiffs, v. NORTH CAROLINA STATE BOARD OF ELECTIONS, *et al.*, Defendants.	**LEGISLATIVE DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

Defendants Philip E. Berger, in his official capacity as President *Pro Tempore* of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House ("Legislative Defendants"), hereby submit this Memorandum in Support of their Motion to Dismiss Plaintiffs' Complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. Contrary to Plaintiffs' allegations, this case does not present a "major question of first impression." (Compl. p. 2). Rather, Plaintiffs' claims are identical to the claims raised by the plaintiffs and found nonjusticiable by the North Carolina Supreme Court in *Harper v. Hall*, 384 N.C. 292, 886 S.E. 2d 393 (2023) (hereinafter, "*Harper III*"). Because *Harper III* squarely resolves these issues, Plaintiffs' Complaint must be dismissed.

FACTUAL BACKGROUD

As required by the federal and state Constitutions, following the 2020 Census, on November 4, 2021, the General Assembly enacted new redistricting plans for the North Carolina House and Senate as well as the United States House of Representatives (the "2021 Plans"). Three groups of plaintiffs, Common Cause, the Harper Plaintiffs, and the NCLCV Plaintiffs, filed suit challenging the legality of all three plans arguing that they were unconstitutional partisan

gerrymanders under the North Carolina Constitution. More specifically, the plaintiffs argued that the 2021 Plans violated the Free Elections Clause, the Equal Protection Clause, and the Freedom of Speech and Freedom of Assembly Clauses of the North Carolina Constitution. N.C. Const. art. I, §§ 10, 19, 12, 14; *N.C. League v. Hall*, No. 21-CVS-015426, 2021 WL 6883732, at *1-*2 (N.C. Super. Ct. Dec. 3, 2021) (describing *NCLCV* and *Harper* plaintiffs' claims). The case was assigned to a three-judge panel of the Wake County Superior Court. After an expedited review of an order denying plaintiffs' motions for preliminary injunction on December 8, 2021, the North Carolina Supreme Court ordered an expedited trial to take place the first week of January 2022. On January 11, 2022, the panel entered judgment for Legislative Defendants after finding that plaintiffs' partisan gerrymandering claims were nonjusticiable political questions under the North Carolina Constitution. *Harper III*, 384 N.C. at 301-305, 886 S.E.2d at 401-403 (recounting case history).

Plaintiffs appealed.[1] On February 4, 2022, the Court issued a "remedial order" holding that the 2021 Plans were unconstitutional beyond a reasonable doubt under the sections of the state Constitution cited by the plaintiffs. The remedial order enjoined elections under the 2021 Plans and provided the General Assembly with a short opportunity to adopt new plans consistent with a full opinion the Court promised would soon be issued. The "full" opinion was issued ten days later in *Harper v Hall*, 380 N.C. 317, 868 S.E.2d 499 (2022) ("*Harper I*"). *See Harper III*, 384 N.C. at 305-308, 886 S.E.2d at 403-405.

On remand, the General Assembly enacted three new remedial plans (the "2022 Plans"). The 2022 Plans complied with two metrics for measuring so-called partisan fairness cited by the

[1] Plaintiffs were instructed to file a direct appeal to the Supreme Court after the Supreme Court granted a bypass petition on the appeal from the three judge panel's order denying Plaintiffs' motion for preliminary injunction. *See Harper v. Hall,* 379 N.C. 656, 865 S.E.2d 301 (2021) (Mem).

Court in *Harper I*—the "Mean-Median Difference" and the "Efficiency Gap." *Harper III*, 384 N.C. at 308-309, 886 S.E.2d at 405-406. The General Assembly relied upon these two metrics in enacting the 2022 Plans because the Court in *Harper I* explicitly held that plans with a Mean-Medium Difference of less than 1% and an Efficiency Gap of at or less than 7% would be "presumptively constitutional." *Id.* at 305, 886 S.E.2d at 403-04. All three of the 2022 Plans met these metrics. *Id*.

When the case was remanded by *Harper I*, the three-judge panel hired Robert F. Orr (the lead attorney in this case), Robert H. Edmunds, and Thomas W. Ross (a Plaintiff in this case) to serve as court-appointed Special Masters to assist in evaluating the remedial plans. The Special Masters in turn hired four well-known academics as advisors to assist them in evaluating the 2022 Plans.[2] *Harper III*, 384 N.C. at 308, 886 S.E.2d at 405. The Special Masters issued a report finding that the 2022 House and Senate Plans complied with *Harper I*, but that the 2022 Congressional Plan did not. *Id.* at 310, 886 S.E.2d at 406. As a result, the Special Masters, through the assistance of their advisor, Dr. Bernard Grofman, drew an alternative congressional plan as a proposed remedy for the allegedly illegal 2022 Congressional Plan. *Id.* The three-judge panel then adopted the Special Masters' report in full and directed that elections in 2022 proceed under the 2022 Plans for Senate and House and the Special Masters' congressional plan. *Id.* at 310-311, 886 S.E.2d at 406-07.

Following the order by the three-judge panel, all parties appealed to the North Carolina Supreme Court. The Court resolved these appeals in its decision of *Harper v. Hall*, 383 N.C. 89,

[2] Legislative Defendants moved for the exclusion of two of these "Special Advisors" for engaging in *ex parte* communications with the plaintiffs' experts, who acknowledged the communications were in violation of the three-judge panel's order. *Harper II,* 383 N.C. at 100, 104, 881 S.E.2d 156, 166, 168 (2022). The panel denied that motion. *Id.*

881 S.E.2d 156 (2022) ("*Harper II*"). In *Harper II*, the Court affirmed the three-judge panel's rejection of the 2022 Congressional Plan and its approval of the 2022 House Plan. However, the *Harper II* Court found that the 2022 Senate Plan, despite meeting all the fairness measures set forth in *Harper I,* still constituted an illegal partisan gerrymander. *Harper III*, 384 N.C. at 311-12, 886 S.E.2d at 407.

On January 20, 2023, Legislative Defendants timely filed a petition for rehearing under Rule 31 of the North Carolina Rules of Appellate Procedure. The Court granted the petition for rehearing on February 3, 2023. *Harper III*, 384 N.C. at 314, 886 S.E.2d at 409. On April 28, 2023, the Court entered its opinion in *Harper III*, which overruled *Harper I* and withdrew *Harper II*. *Id.* at 379, 886 S.E.2d at 449.

Harper III is now the law of the land. In its robust opinion, the *Harper III* Court unequivocally held that partisan gerrymandering claims are nonjusticiable political questions under the North Carolina Constitution because apportionment is textually committed to the General Assembly, "[t]here *is no judicially manageable standard by which to adjudicate partisan gerrymandering claims[,]" id*. at 378, 886 S.E.2d at 448-49, and, unlike other states, the N.C. Constitution does not contain an express prohibition or limit on partisan gerrymandering. *Id.* at 337, 345-46, 886 S.E.2d at 423, 428. The Court further held that neither the history nor the caselaw interpreting the state's Free Elections Clause, Equal Protection Clause, or Freedom of Assembly and Free Speech Clauses supported a constitutional prohibition on partisan gerrymandering. *Id.* at 369-70, 886 S.E.2d at 443. This opinion in *Harper III* restored alignment with previous decades of jurisprudence, which had previously held similar redistricting claims nonjusticiable. *Leonard v. Maxwell*, 216 N.C. 89, 99, 3 S.E.2d 316, 324 (1939); *Dickson v. Rucho*, 367 N.C. 542, 546, 766 S.E.2d 238, 242 (2014) ("*Dickson I*").

Due to the erroneous interpretation of the North Carolina Constitution adopted by the Court in *Harper I*, the *Harper III* Court determined that the original redistricting plans could not be reinstated and granted the General Assembly an opportunity to enact a new set of legislative and congressional redistricting plans. *Harper III,* at 378, 886 S.E.2d at 448. Following *Harper III*, in October 2023, the General Assembly enacted three new redistricting plans. *See* S.L. 2023-145 ("2023 Congressional Plan"); S.L. 2023-146 ("2023 Senate Plan"); and S.L. 2023-149 ("2023 House Plan") (collectively, the "2023 Plans"). (*See* Compl. ¶¶ 24, 52, 75, 83).

Plaintiffs filed their Complaint on January 31, 2024. The Complaint alleges only one claim for relief: for "Violation of the Right to Fair Elections" under Article I, Section 36 of the North Carolina Constitution. (Compl. p. 24). That claim is based upon Plaintiffs' contention that "there is a right to 'fair' elections secured as an unenumerated right in the North Carolina Constitution." (Compl. ¶94). With a theory far more audacious than those rejected in *Harper III*, Plaintiffs here would have the Court create an entirely new right beyond the text of North Carolina's Constitution that the General Assembly infringes upon when a redistricting plan "gives a specific political party or candidate a determinative advantage in the election by intentionally 'apportioning' voters favorable to that specific political party into the specific district or 'apportioning' voters unfavorable to the specific political party out of the specific district." (Compl. ¶ 95). Plaintiffs contend that the 2023 Plans do not satisfy this constitutional definition of "fairness" because all three maps allegedly intentionally assign voters in four congressional districts, one Senate district, and one House district on the basis of partisanship to benefit Republicans. (Compl. ¶¶ 47-91, 96). Plaintiffs make no claims or provide no new insight into how to measure "determinative

advantage[3]" or when an "advantage" for a party somehow becomes unconstitutional. Nor do Plaintiffs offer any insight into whether this "advantage" should be measured on a district-by-district basis, or statewide. In the end, Plaintiffs offer nothing but an inventive twist on already foreclosed claims of partisan gerrymandering that the North Carolina Supreme Court found non-justiciable just last year, and allege nothing to show why the outcome here should be any different.

ARGUMENT

I. Standard.

Dismissal is appropriate under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure for lack of subject matter jurisdiction. Courts do not have subject matter jurisdiction to rule on non-justiciable "political" questions which, under the separation of powers doctrine, are assigned for resolution to another branch of government other than the judiciary. *See Bacon v. Lee*, 353 N.C. 696, 698, 549 S.E.2d 840, 843 (2001). Dismissal is also appropriate under Rule 12(b)(6). When considering a motion to dismiss made under N.C. R. Civ. P. 12(b)(6), the court must "consider 'whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.'" *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 7996 (2013) (quoting *Coley v. State*, 360 N.C. 493, 494, 631 S.E.2d 121, 123 (2006)). "As such, when considering a Rule 12(b)(6) motion, the trial court is limited to reviewing the allegations made in the complaint." *Blue v. Bhiro*, 381 N.C. 1, 5, 871 S.E.2d 691, 694 (2022) (internal citations omitted). In any constitutional challenge, a court must presume the

[3] The idea that the phrase "determinative advantage" is somehow judicially manageable (Compl. ¶95), is absurd on its face. Elections, by their very nature, require that one candidate achieve a "determinative advantage" in the form of more votes, even a single vote, to be the determined winner. Moreover, how many members of one party would constitute a "determinative" advantage is left entirely undefined and would certainly depend on the candidates and the preferences of North Carolina's many unaffiliated voters, who Plaintiffs' complaint seemingly ignores.

constitutionality of an act of the General Assembly. *Harper III*, 384 N.C. at 323, 886 S.E.2d at 414 (citing *State v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016)). As Plaintiffs challenge the constitutionality of an act of the General Assembly, they "must identify an express provision of the constitution and demonstrate that the General Assembly violated that provision beyond a reasonable doubt." *Id.* at 298, 886 S.E.2d at 399 (quotation omitted).

II. Plaintiffs' partisan gerrymandering claims are barred by *Harper III*.

First, and dispositively, Plaintiffs only make a claim for partisan gerrymandering thereby raising a "political question that is nonjusticiable under the North Carolina Constitution." *Harper III*, 384 N.C. at 300, 886 S.E.2d at 400-01. Specifically, Plaintiffs contend that the state Constitution is violated when redistricting plans "give a specific political party or candidate a determinative advantage in the election by intentionally 'apportioning' voters favorable to that specific political party into the specific district or 'apportioning' voters unfavorable to that specific political party out of the specific district." (Compl. ¶ 95)[4]. This falls squarely into the category of a claim for partisan gerrymandering, as that term has been defined by the *Harper III* Court. *Id.* at

[4] In their roles as Special Masters, Plaintiff Ross and Plaintiffs' counsel Orr engaged in exactly this behavior, apportioning voters based on their political affiliation to the benefit of Democratic voters to produce a congressional map that they perceived to be more "fair." *Harper III,* 384 N.C. at 292, 886 S.E2d at 393, n. 17; *Harper II,* 383 N.C. 89 at ¶¶48, 52-54. In fact, three justices in dissent accused them of drawing to benefit one political party, claiming that the public "could legitimately question the objectivity of this court-appointed, de facto 'redistricting commission'" because of Counsel Orr's "direct" and "public[]" "participat[ion] in advertisements…for a Democratic congressional candidate in a district he created during this remedial process." *Id.* at ¶152, n.4 (Newby, J., dissenting). It is unclear why apportioning voters based on political affiliation to meet a subjective definition of "fair" is permissible when done by laypersons to the benefit of Democrats, but not permissible, when supposedly done by the duly elected representatives of the people of North Carolina performing their obligations under the North Carolina constitution. *Id.* at ¶¶124, 229 (Newby, J. dissenting). This lack of clarity, and lack of any judicially manageable standard, is precisely the reason Plaintiffs' claims are nonjusticiable and must be dismissed.

315-16, 886 S.E.2d at 410 (distinguishing of partisan gerrymandering claims from other types of redistricting claims (*citing Rucho v. Common Cause*, 139 S. Ct. 2482 (2019)).

Plaintiffs in *Harper III* also brought partisan gerrymandering claims, contending that "the General Assembly violated the state constitution by drawing legislative districts that unfairly benefited one party at the expense of another…." *Id.* at 299, 886 S.E.2d at 400. The substance of the claim alleged here is identical. There is simply no material difference between the "advantage" alleged here and the "unfair benefit" alleged in *Harper.* Because the claims are identical, *Harper III* requires dismissal. 384 N.C. at 326-350, 886 S.E.2d at 416-431.

III. Partisan gerrymandering claims are nonjusticiable political questions.

The North Carolina Supreme Court's opinion in *Harper III* represents an encyclopedic and binding explanation of the General Assembly's redistricting authority and the limited role of the judiciary in reviewing redistricting plans. In the interest of brevity, Legislative Defendants will focus only upon a few major points that highlight the meritless nature of Plaintiffs' claims.

As noted in *Harper III*, there are no state constitutional restrictions on the General Assembly's authority to apportion congressional districts. *Harper III,* 384 N.C. at 330-31, 886 S.E. 2d at 419. The authority to draw congressional districts is granted to the General Assembly by the federal Elections Clause, which contains no express restrictions on how districts must be apportioned. *Id.* at 314, 886 S.E.2d at 409 (citing U.S. Const. art. I, sec. 4, cl. 1). In contrast, Article II of the North Carolina Constitution expressly delegates to the General Assembly the discretion to apportion Senate and House districts. *See* N.C. Const. art. II, §§ 1-5. There are several very specific and direct limits on the General Assembly's districting authority found in Article II. *See* N.C. Const. art. II, §§ 2-5. These are the only express restrictions found in the state Constitution that limit the General Assembly's discretion to draw districts. *Harper III*, 384 N.C. at 322-23, 886

S.E.2d at 413-14; *Stephenson v Bartlett*, 355 N.C. 354, 390, 562 S.E.2d 377, 402 (2002) (*Stephenson I*) (Orr, J., concurring in part).

Separation of powers principles limit judicial review when there is an express delegation of the redistricting power in the text of the state Constitution to the General Assembly. *See Harper III*, 384 N.C. at 323, 886 S.E.2d at 414 (citing *State v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016)). Then-Justice Orr recognized these principles in his concurring opinion in *Stephenson I*, 355 N.C. at 390, 562 S.E.2d at 402 (Orr, J., concurring) (noting the "State Constitution is not a grant of power but serves instead as a limitation of power[.]"). Thus, "all power which is not expressly limited by the people in our Constitution remains with the people and that an act of the people through their representatives in the General Assembly is valid unless expressly prohibited by that constitution." *Id.* Therefore, absent an express prohibition on partisanship considerations in districting in the North Carolina Constitution, which *Harper III* held is nowhere to be found, the General Assembly is free to make the policy decisions required in reapportionment subject to express state and federal law. *Harper III*, 384 N.C. at 334, 886 S.E.2d at 421; *Stephenson I*, 355 N.C. at 371, 562 S.E.2d at 390 ("The General Assembly may consider partisan advantage and incumbency protection in application of its discretionary redistricting decisions, . . . but it must do so in conformity with the State Constitution.").

IV. Article I, Section 36 cannot be used to state a claim in and of itself.

Plaintiffs' legal theory that an unenumerated constitutional right to "fair" elections can be enforced through Article I, Section 36 of the North Carolina Constitution relies on an unprecedented and erroneous interpretation of the Declaration of Rights.

Plaintiffs ignore that the Declaration of Rights merely provides "'a statement of general abstract principles'" and that "many provisions of the Declaration of Rights do not give rise to

justiciable rights." *Harper III*, 384 N.C. at 431-32, 886 S.E.2d at 431-32 (citing N.C. Const. art. I, sec. 6); *Dickson I*, 367 N.C. at 575, 766 S.E.2d at 260. The North Carolina Supreme Court has previously determined that similar provisions of the Declaration of Rights do not place justiciable restrictions on the General Assembly's redistricting authority. First, in *Dickson I*, the Court ruled that Article I, Section 2 (the "Good of the Whole Clause") provided no justiciable restrictions on the General Assembly's redistricting authority. 367 N.C. at 575, 766 at 260. In *Harper III*, the Court reached the same conclusion on partisanship considerations under Article I, Section 10 (the "Free Elections Clause"); Article I, Section 19 (the "Equal Protection Clause"); Article I, Section 12 (the "Right of Assembly and Petition" Clause); and Section 14 (the "Freedom of Speech and Press" Clause). *Harper III*, 384 N.C. at 351-370. 886 SE.2d at 431-443.

Article I, Section 36 is entitled "Other rights of the people" and simply provides that "[t]he enumeration of rights in this Article shall not be construed to impair or deny others retained by the people." N.C. Const. art. I, § 36. Without citing a single case that supports their interpretation, Plaintiffs claim that Section 36 can be used to create an unenumerated justiciable right. But, this argument is nothing more than an invitation to this Court to discard the way the Supreme Court has held the North Carolina Constitution should be interpreted. This Court should decline that invitation.

Proper interpretations of the Constitution look to the "plain text of the constitution" and courts may "not search for a meaning elsewhere." *State v. Webb*, 358 N.C. 92, 97, 591 S.E.2d 505, 510 (2004); *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 479 (1989) (citing *Elliott v. Gardner,* 203 N.C. 749, 753, 166 S.E. 918, 920–21 (1932)). Here, there are "no hidden meanings or opaque understandings" of Article I, Section 36, and because it plainly does not create a justiciable right, it cannot be read to do so. *Harper III,* 384 N.C. at 297, 886 S.E.2d at 399.

Moreover, the history of Article I, Section 36 supports this as, Article I, Section 36 has never been construed to create enumerated rights separately independent from other provisions of the Declaration of Rights that do. *See, e.g., Fearrington v. City of Greenville,* 282 N.C. App. 218, 871 S.E.2d 366 (2022) (combined with substantive due process claim under art. I, sec. 19); *ACT-UP Triangle v. Comm'n for Health Servs. of the State of N. Carolina,* 345 N.C. 699, 483 S.E.2d 388 (1997) (same).

Next, Plaintiffs seemingly allege that the Court should somehow construe Article I, Sections 9 and 10 to impair or deny some unenumerated constitutional right to "fair" elections. But as *Harper III* and other binding precedent cited by Plaintiffs, that the Free Elections Clause implicates election administration, not redistricting plans. *Harper III*, 384 N.C. at 363, 886 S.E.2d at 439 (quoting *Swaringen v. Poplin*, 211 N.C. 700, 702, 191 S.E. 746, 747 (1937)) (recognizing the right to frequent, free elections which includes a "free ballot"); *Clark v. Meyland,* 261 N.C. 140, 143, 134 S.E.2d 168, 170 (1964) (interpreting Free Election Clause under Article I, Section 10 in ballot access case). Tellingly, Plaintiffs suggest no judicially manageable standard for how to measure the unenumerated "fair" provision they want read into the Constitution. And as the North Carolina Supreme Court already noted, so-called fairness tests are fraught with error, which led even the Court in *Harper II,* to abandon the so called "standards" they set forth in *Harper I. See Harper III,* 384 N.C. at 349-350, 886 S.E.2d at 430-31.

CONCLUSION

There is no basis in the text of the North Carolina Constitution to recognize Plaintiffs' reformulated "fairness" standard that has already been condemned by the North Carolina Supreme Court. Plaintiffs' Complaint should be summarily dismissed with prejudice for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

Respectfully submitted, this the 10th day of May, 2024.

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CERTIFICATE OF SERVICE

I, Phillip J. Strach, hereby certify that I have served a copy of the foregoing document upon counsel of record via email pursuant to N.C. R. Civ. P. 5.

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